Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

Susan Beachy, *Petitioner*

v.

Boise Cascade Corporation, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether in an action brought under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, where the plaintiff suffers from a physical or mental impairment but not the one that is contended to have engendered the discrimination, it is error not to instruct the jury that perceived disability discrimination includes cases where the employer regards the employee to have a physical or mental impairment the employee in fact does not have.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

Susan Beachy, *Petitioner*

v.

Boise Cascade Corporation, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Susan Beachy respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix, *infra*, 1a-12a) is reported at 191 F.3d 1010 (C.A. 9 1999). By order entered October 20, 1999, the Ninth Circuit denied the petition for rehearing and the

petition for rehearing en banc (Appendix, *infra*, 13a). The district court decision is unreported.

JURISDICTION

On September 8, 1999, the United States Court of Appeals for the Ninth Circuit entered its order and opinion in this case. On October 20, 1999, the United States Court of Appeals for the Ninth Circuit entered its order denying the timely petition for rehearing and the petition for rehearing en banc of Susan Beachy. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutes involved are as follows:

42 U.S.C. § 12102(2)

As used in this chapter:

(2) Disability

The term "disability" means, with respect to an individual–

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12112(a)

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The relevant regulations involved are as follows:

29 C.F.R. § 1630.2(h)

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs,

respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine;

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(l)

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

STATEMENT OF THE CASE

Facts

Plaintiff, Susan Beachy, was employed by Defendant, Boise Cascade, from 1980 to July 1994, when she claimed she

was terminated, *inter alia,* because she was perceived to be a disabled person. Transcript of Trial Testimony (hereinafter "T.") 119; 279; Trial Exhibit 33. There was evidence Plaintiff sustained multiple physical ailments and complaints from and after an automobile accident which occurred in September 1993. Those included whiplash, problems with her neck, shoulders and upper back, problems with her vision, including double and blurred vision, severe headaches, and difficulty raising her arms. T. 131-132.

The most potentially severe and stigmatizing medical problem she may have suffered, though, was on March 3, 1994, where in the presence of her supervisor she suffered what one of her doctors, a chiropractor, diagnosed as a "mini-stroke" at work, during which her face went numb and the numbness went down her arm. T. 156, 216. On March 10, 1994, in a meeting with her supervisor, Plaintiff reminded her supervisor of the March 3 event and characterized it as a

"stroke." T. 576-577. Plaintiff testified another of her doctors, a Dr. LaFrance, thought that event was not a stroke, but was likely associated with an unrelated condition, migraine headaches. T. 216-217.

There was evidence that after her automobile accident of September 1993, Plaintiff's employer became concerned about the number of medical appointments Plaintiff had to attend, and commencing in January 1994 began to be critical of Plaintiff on that account. T. 136. There was evidence Plaintiff was criticized because her pained expression was interpreted as "grumpy." T. 136-140. She was told if she did not get on board she would be out. T. 138. She received a negative performance review on March 1. T. 144-145; Ex. 16. She was told the expressions on her face made people not want to approach her or ask her questions. T. 152-153. She told her supervisors she was having "major medical problems." T. 153.

After the "stroke" incident on March 3 her new supervisor was told by her supervisor's boss that she should offer Plaintiff four months of severance if she would just quit. T. 161. In June, information was removed from her computer that made it impossible for Plaintiff to do her job. T. 381-382. On July 1 she was given notice of termination. Ex. 33. The termination memo relied upon incidents which occurred in June that Plaintiff rebutted at trial. T. 165-175, 382-383, 397.

Proceedings Below

Plaintiff brought an action in state court for damages under the Americans with Disabilities Act ("ADA" or "Act"), 42 U.S.C. § 12101 *et seq.*, and Oregon state law, for actual and perceived disability discrimination, as well as asserting other claims based upon the termination of her employment which are not at issue here. Defendant removed the action to the United States District Court for the District of Oregon. The District Court had federal question jurisdiction over Plaintiff's

ADA claim pursuant to 28 U.S.C. § 1331. The District Court had jurisdiction over Plaintiff's state claims pursuant to its supplemental jurisdiction. 28 U.S.C. § 1367.

At trial, Plaintiff voluntarily dismissed that portion of her claim for actual disability discrimination and tried to a jury her claim for perceived disability discrimination under federal and state law.

At trial Plaintiff requested a jury instruction that included all three subparts of the definition of "regarded as having an impairment," which in pertinent part read:

> "PLAINTIFF'S REQUESTED INSTRUCTION NO. 10
> Perceived Disability Discrimination
>
> The first claim for you to decide is whether Defendant unlawfully discriminated against Plaintiff because Defendant perceived her to be a disabled person.
>
> Under the law:
>
> > . . . [I]t is unlawful for any employer to . . . discharge from employment or to discriminate . . . in terms, conditions, or privileges of employment because:

* * *

> (c) An individual is regarded as having a physical . . . impairment.

Is regarded as having an impairment means that the individual:

> (A) Has a physical . . . impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation; or
>
> (B) Has a physical . . . impairment that substantially limits major life activities only as a result of the attitude of others toward such an impairment; or
>
> (C) Has no physical . . . impairment but is treated by the employer or supervisor as having an impairment. . . ."

Subpart (C) of that instruction was based upon the appertaining federal regulations:

"(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment." 29 C.F.R. § 1630.2(1)(3).

The trial court refused to give subpart (C) of the instruction because, it said, there was evidence Plaintiff suffered "some" physical or mental impairment. T. 662-665.[1]

After being duly instructed the jury returned a verdict for Defendant on Plaintiff's perceived disability discrimination claim.

REASONS FOR GRANTING THE WRIT

I. The Significance Of The Question Presented.

This is a case of first impression concerning the interpretation of the statutory meaning of "regarded as" disabled under the ADA and the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") relating to the definition of "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(1).

---

[1] The trial court expressly noted there was evidence Plaintiff suffered "depression." T. 662. The Court of Appeals noted, "The evidence at trial demonstrated that Beachy suffered from multiple impairments, including pain in her neck, back and shoulders, vision problems, severe headaches and numbness through her face and arm." Appendix, *infra,* 5a.

As interpreted by the Ninth Circuit in the instant case, that regulation was misconstrued, because the court held that as a matter of law the presence of one or more non-substantially limiting impairments precludes liability for discriminatory treatment based upon a non-existent impairment that is treated as it if were substantially limiting. Appendix, *infra*, 5a. The Ninth Circuit's construction would preclude a jury from being instructed that even though an employee did not have a dread disease, for example, it could render its verdict in the employee's favor if it found the employer terminated the employee because it erroneously believed the employee had that disease, where there was also evidence the employee in fact had some other, albeit unrelated, nonsubstantial physical or mental impairment.

The statutory language of the ADA is not so limited. Any interpretation of the federal regulations so as to require such a limited protection is contrary to the policy behind the

Act and Congressional intent. H.R. Rep. No. 485 part 3, 101st Cong., 2nd Sess. 30 (1990) (hereinafter "House Judiciary Report"); 29 C.F.R. pt. 1630, App. § 1630.2(2) (citing legislative history).

II. The Ninth Circuit Erred In Holding That Undisputed Evidence Of The Existence Of An Impairment, No Matter How Unrelated, Insubstantial Or Non-Stigmatizing, Precludes Giving An Instruction On The Third Prong Of "Regarded As" Disabled.

Under the ADA, an individual with a disability is defined as a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having an impairment. 42 U.S.C. § 12102(2)(C).

In turn, "regarded as having such an impairment" has been defined by the EEOC as follows:

"(1) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; or

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment."

29 C.F.R. § 1630.2(1) (1994) (italics in original).

Paragraph (h)(1) and (2) of that section read:

"(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, or endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic

> brain syndrome, emotional or mental illness, and specific learning disabilities."

29 C.F.R. § 1630.2(h) (1994) (italics in original).

As recognized by this Court in *Sutton v. United Airlines, Inc.*, --- U.S. ---, 119 S.Ct. 2139, 2145, 144 L.Ed.2d 450 (1999), Congress did not grant the EEOC, nor any other agency, authority to issue regulations interpreting the generally applicable provisions of the ADA including the term "disability." Thus, the EEOC's definition of "regarded as" disabled is invalid as it was not promulgated pursuant to the agency's authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988). However, in enacting the ADA, Congress commanded that the ADA must be interpreted "to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Bragdon v. Abbott*, 524 U.S. 624, ---, 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1998), citing 42 U.S.C. § 12201(a).

Regulations issued pursuant to the Rehabilitation Act in effect prior to the enactment of the ADA define "is regarded as having an impairment" to mean that an individual:

> "(i) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;
>
> (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments; or
>
> (iii) has none of the impairments defined in paragraph (b)(1) [defining physical or mental impairment] of this section but is treated by a recipient as having such an impairment."

28 C.F.R. § 41.31(b)(4) (1989).

Despite the lack of the EEOC's power to issue regulations interpreting the term disability, the term should be construed in accordance with the pre-existing regulatory interpretations. *Bragdon,* 524 U.S. at ---, 118 S.Ct. at 2202 (1998). It is therefore appropriate to use the definition of "regarded as" handicapped issued under the Rehabilitation Act

to interpret the term under the ADA. Thus, regardless of the validity of the EEOC's regulation, the definition of the term as articulated by the EEOC is appropriate as it is consistent with the Rehabilitation Act. However, as discussed below, to be consistent with the statutory language and purpose of the ADA, the third subpart of the definition of "regarded as" should not be construed so as to exclude individuals who may suffer from some impairment but assert that a non-existing impairment formed the basis for the employer's perception of the individual as disabled.

In this case, as it pertained to the most serious and stigmatizing health condition that could have affected the employer's perception of Plaintiff's health, the stroke, Plaintiff's theory was not that she actually suffered a stroke, for medical evidence during her employment was in dispute on that issue. Instead, Plaintiff's theory was that during her employment the employer was afraid that she had suffered a

stroke, and discriminated against her as a result. Yet, because she suffered "some physical impairment," the court opined she was not entitled to have the jury instructed on the third prong of the "regarded as" definition. Appendix, *infra*, 5a. That limitation is not required by the statutory language and is contrary to the policies and purposes behind the Act.

According to the Interpretive Guidance on Title I of the Americans With Disabilities Act issued by the EEOC:

> "An individual satisfies the third part of the 'regarded as' definition of 'disability' if the employer . . . erroneously believes the individual has a substantially limiting impairment that the individual actually does not have."

29 C.F.R. pt. 1630, App. § 1630.2(1). Whether or not the employee has one of the physical or mental impairments specified in paragraph (h)(1) or (2) is not determinative of potential liability. Rather, the issue is whether the employer erroneously perceived the employee to have one of those impairments, erroneously perceived it to be substantially

limiting, and discriminated against the employee because of that misperception. 42 U.S.C. § 12102(2)(C) ("The term 'disability' means, with respect to an individual. . . being regarded as having such an impairment.")

According to the Ninth Circuit's holding in this case, an amputee who claims to have been terminated by the employer because the employer fears erroneously that the person is HIV positive, would be disqualified from the protection of the Act merely because he or she is one-armed. It is illogical to interpret the regulations in that way, and regulations must be consistent with the purpose of the Act as expressed by Congress. *Manhattan Gen. Eq. Co. v. Commissioner of IRS*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936). It would defeat coverage by the Act and frustrate the Act's ameliorative purpose to so interpret the regulation. *Tcherepnin v. Knight,* 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967) (remedial legislation

construed broadly to effectuate its purpose). Rather, it is clear that instead of construing the introductory phrase of the regulation as a qualifier ("has none of the . . ."), it should be construed to be a modifier, is perceived to have a substantially limiting condition, but does not have the impairment the employee contends the employer perceives the employee to have. *See United States v. American Trucking Assn's.*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940) (court follows purpose of act when plain meaning produces result at variance with policy of the act). Such a construction is consistent with the purpose behind the Act, as indicated by legislative history, to protect against disabilities created not by the condition itself but by "society's accumulated myths and fears about disability and diseases. . ." House Judiciary Report at 30, quoting *School Board of Nassau County v. Arline*, 480 U.S. 273, 284, 107 S.Ct. 1123, 1129, 94 L.Ed.2d 307 (1987).

This Court should hold that the regulation in question, 29 C.F.R. § 1630.2(1) is to be interpreted so that the physical or mental "impairment" referred to is the one that is contended to have motivated the adverse personal action, and that if the person does not have that impairment, a plaintiff is entitled to subsection (3) as part of a perceived disability discrimination instruction, regardless of the presence of other impairments. It should hold that the phrase "has none of the impairments" in 29 C.F.R. § 1630.2(1) modifies the last phrase of that subsection "but is treated by a covered entity as having a substantially limiting impairment" so as to mean that the person is considered "disabled" and therefore covered by the ADA if they are thought to have a substantially limiting impairment they do not have, regardless whether they may in fact have a different substantial or non-substantial impairment.

In this case, Plaintiff could not prove that what she suffered on March 3 was a stroke, only that her employer

perceived that it was. Therefore, she did not set out to adduce evidence at trial that she in fact suffered that physical impairment on March 3, 1994. Her theory was that the employer discriminated against her, *inter alia*, because of the perception she had a stroke she did not in fact have. But because of the trial court's ruling, the jury did not hear an instruction to support Plaintiff's theory that it was irrelevant whether or not she actually suffered a stroke. Instead, the jury was given a perceived disability instruction that required proof of the factual existence of an impairment, and was told the Plaintiff carried the burden of proof on that issue. The jury also heard Defendant argue that it should be concerned about the lack of medical evidence to corroborate Plaintiff's claimed impairments. T. 713-714, 735.

Because one of Plaintiff's theories was whether Plaintiff was discriminated against because of the perception she had a stroke, and evidence was in dispute as to whether she

in fact suffered a stroke, it was incumbent on the trial judge to instruct according to that theory, despite evidence she had some "other" physical ailment or symptom. "A party is entitled to an instruction concerning his or her theory of the case if it is supported by law and has some foundation in the evidence." *Jenkins v. Union Pacific RR. Co.*, 22 F.3d 206, 210 (C.A. 9 1994). Regardless of her lay testimony on the "stroke" issue, and regardless of the jury's acceptance of her testimony that she suffered numbness on March 3, the jury was entitled to consider whether, even though it believed she did not suffer a stroke on March 3, the employer feared that she did and discriminated against her as a result of the fear related to the employer's perception of her stroke.

In sum, the Court erred because the theory of the case was not that Defendant overreacted to Plaintiff's non-disabling "numbness," by believing it was substantially limiting, or that Defendant's attitude towards persons with numbness in their

face and arms was disabling. Rather, one of her theories was that Defendant perceived that she suffered a stroke she did not in fact experience and discriminated against her on account of that perception. If the jury believed that Plaintiff did not actually suffer a stroke, and thus did not have *that* impairment, but that Defendant nevertheless discriminated against her because of *that perceived stroke*, there was no jury instruction to inform the jury that that conduct gave rise to liability under the Act. The third prong of the definition of "regarded as" was necessary to address that situation.

As a matter of law the presence of some other impairment should not prevent the third prong of the "regarded as" definition from being applicable where one theory of discrimination rests upon the perception of a particular non-existent impairment.

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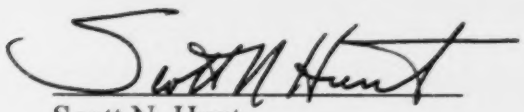
CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit.

DATED this 18th day of January, 2000.

Respectfully submitted,



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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Susan Beachy, *Plaintiff-Appellant,*	No. 98-35321
v.	D.C. No. CV96-00656-JJ
Boise Cascade Corporation, *Defendant-Appellee.*	OPINION

Appeal from the United States District Court
for the District of Oregon
John A. Jelderks, Magistrate Judge, Presiding

Argued and Submitted
May 3, 1999 - Portland, Oregon

Filed September 8, 1999

Before: William C. Canby, Jr. and Thomas G. Nelson
Circuit Judges, and Jeremy Fogel, District Judge.[1]

Opinion by Judge Fogel

OPINION

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[1]The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

FOGEL, District Judge:

Susan Beachy ("Beachy") appeals a judgment in favor of her former employer, Boise Cascade Corporation ("Boise"), with respect to Beachy's claims of discrimination and wrongful discharge. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the judgment.

BACKGROUND

Beachy began working for Boise as a log accountant in 1980, keeping records of the company's deliveries of different types of logs to various destinations. On September 7, 1993, she was involved in an automobile accident, after which she suffered pain in her neck, shoulders and upper back, vision problems, severe headaches and sporadic numbness throughout her face and arm. She saw chiropractors, an orthopedic surgeon and a neurologist for treatment and occasionally missed work because of medical appointments.

Beginning in January 1994, Beachy began receiving reprimands regarding poor attitude and poor performance. These reprimands came from a number of persons: D. Bridges, who acted as Beachy's immediate supervisor from January 1994 through February 1994; Lana Tuss, who replaced Bridges as Beachy's immediate supervisor in March 1994; DeAnna Mandich, the accounting supervisor; and Dick Hill, the regional controller. Beachy received an unfavorable annual performance review on March 10, 1994 and was terminated on July 1, 1994.

Beachy subsequently filed suit against Boise, asserting *inter alia* that her termination was motivated by disability

discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* and Oregon Revised Statutes § 659.425. The case was tried before an eight-person jury, which returned a verdict for Boise.[2] Magistrate Judge Jelderks, who presided over the trial, entered judgment in favor of Boise on March 12, 1998.

Beachy contends that she was denied a fair trial as a result of three trial court errors. First, she contends that Judge Jelderks erred in failing to give a complete instruction on perceived disability discrimination. Second, she contends that Judge Jelderks improperly excluded testimony by Boise employees who claimed to have encountered intolerance to medical problems while at Boise. Finally, she contends that Judge Jelderks erred in admitting into evidence a Notice of Dismissal and Dismissal Memo issued by the Oregon Bureau of Labor and Industries ("BOLI")[3] and in failing to give a limiting instruction regarding these documents.

STANDARD OF REVIEW

We review *de novo* whether a jury instruction misstated the law and review for abuse of discretion the formulation of the

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[2]One of Beachy's claims, asserting pregnancy discrimination in violation of state law, was tried to Judge Jelderks rather than the jury. In addition, Judge Jelderks granted judgment as a matter of law with respect to two other claims, an ADA claim based upon actual disability and a claim arising under the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* Judge Jelderks found for Boise on these claims, none of which is at issue in this appeal.

[3]The BOLI is the state of Oregon's equivalent to the Equal Employment Opportunity Commission ("EEOC").

instruction. *See Fireman's Fund Insurance v. Alaskan Pride Partnership*, 106 F.3d 1465, 1469 (9th Cir. 1997). We review evidentiary rulings for abuse of discretion. *See Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995).

I. Jury Instruction Regarding Perceived Disability

At trial, Beachy claimed that Boise discriminated against her on the basis of a perceived disability. Under both the ADA and Oregon law, an employer may be liable for discriminating against an employee based upon a perceived disability if: (1) the employee has a physical or mental impairment that does not substantially limit major life activities but the employee is treated by the employer as having a substantially limiting impairment; (2) the employee has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) the employee has no impairment but is treated by the employer as having a substantially limiting impairment. *See* 42 U.S.C. § 12102(2)(c); ORS 659.400(2)(c);[4] 29 C.F.R. 1630.2(1).

Judge Jelderks instructed the jury regarding the first two prongs of this test, informing them that:

> An individual is perceived as having a disability if the individual has a physical impairment that does not substantially limit work activities by -

---

[4]The version of ORS 659.400(2)(c) in effect at the time of Beachy's termination and initiation of this action differs slightly from the version currently in effect. However, the differences between the two versions are insignificant and do not affect the analysis set forth herein.

> but is treated by an employer or supervisor as having such a limitation or has a physical impairment that substantially limits major life activities only as a result of the attitude of others toward such an impairment.

However, Judge Jelderks refused to instruct the jury regarding the third prong, addressing perceived disability when the employee suffers no impairment. Beachy argues that Judge Jelderks' instruction as given misstated the law and that he erred by refusing to instruct the jury regarding the third prong.

Judge Jelderks' instruction accurately stated the law with respect to the two prongs it addressed. The question is whether Judge Jelderks' formulation of the instruction, which excluded the third prong of the test, constituted an abuse of discretion.

The record makes clear that Judge Jelderks' decision to exclude the third prong from the jury instruction was based upon his conclusion that it would be inappropriate to instruct on perceived disability in the absence of any impairment when "the unrefuted evidence from the plaintiff herself was that she does have some physical - or at the time did have some physical impairment." The evidence at trial demonstrated that Beachy suffered from multiple impairments, including pain in her neck, back and shoulders, vision problems, severe headaches and numbness through her face and arm. A party is not entitled to a jury instruction which is unsupported by the evidence. *See Fikes v. Cleghorne*, 47 F.3d 1011, 1014 (9th Cir. 1995). Accordingly, Beachy was not entitled to an instruction on the third prong of the test, addressing perceived

disability when the employee has no impairment.[5]

II. Testimony of Other Boise Employees

Beachy attempted to call as witnesses other Boise employees who claimed to have encountered intolerance to medical problems while at Boise. Boise moved *in limine* to exclude the testimony of these witnesses on the ground that the testimony was irrelevant and prejudicial. During the hearing on the motion, Judge Jelderks concluded that the proffered testimony might be admissible if it showed a trend of illegal, discriminatory conduct, but that it would not be admissible if it showed only that Boise was "hard-nosed and didn't tend to humanize their employees much." Judge Jelderks concluded that in the latter case the testimony would not be particularly probative and might unduly prejudice the jury.

One of Beachy's proposed witnesses offered to testify that a

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[5]Beachy argues that an instruction on the third prong of the test should have been given because the jury might not have believed her claims of pain, vision problems, headaches and numbness. However, it appears that all the evidence presented at trial indicated that Beachy suffered at least some of these impairments. There is nothing in the record to indicate that the jury might have concluded that Beachy suffered no impairments whatsoever.

Beachy also argues that an instruction on the third prong was necessary because there was conflicting evidence as to whether a particular episode of numbness was a "mini-stroke." However, even if the jury did not believe that the episode in question was a mini-stroke, the evidence is undisputed that Beachy suffered numbness to her face and arm during the episode and therefore that Beachy suffered some sort of impairment. It is immaterial whether the jury believed that the impairment resulted from a stroke or some other cause; the instruction given by Judge Jelderks would apply in either case.

supervisor treated her harshly for taking time off due to a family illness. Another witness offered to testify that she was reprimanded for having excessive pregnancy-related medical appointments and for making excessive telephone calls related to her baby's medical situation. A third witness was prepared to testify that she experienced "differential treatment" regarding her need for medical appointments. A fourth witness offered to testify that she was "harassed" for having bronchitis and walking pneumonia and was fired after missing two days of work following a miscarriage.

Boise argued, and Judge Jelderks apparently agreed, that it was unclear whether the complained-of conduct was a violation of law at the time it occurred. Judge Jelderks asked Beachy for an expanded witness statement from one of the witnesses. It does not appear that an expanded witness statement was provided. Judge Jelderks ultimately concluded that Beachy had failed to establish that Boise's treatment of the proposed witnesses violated any law and therefore that the probative value to be gained from the testimony was outweighed by the potential for prejudice.

Beachy does not dispute Judge Jelderks' conclusion that the proffered testimony failed to establish prior illegal conduct by Boise. However, Beachy asserts that she was entitled to introduce evidence of Boise's intolerance to medical problems even if prior examples of intolerance did not rise to a violation of law. In support of this assertion she cites *Heyne v. Caruso,* 69 F.3d 1475 (9th Cir. 1995), a case in which the trial court precluded a female employee claiming *quid pro quo* sexual harassment by a supervisor from introducing testimony by other female employees regarding their own sexual harassment by the same supervisor. On appeal, we held that "an

employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group." *Heyne*, 69 F.3d at 1479. Beachy argues that this rule is applicable to her case, and that she should be allowed to introduce evidence that Boise was hostile toward persons with medical problems.

Beachy's argument might be persuasive if the evidence in question indicated that Boise was hostile toward a well-defined and protected group such as persons of a particular race, persons of a particular gender, or persons who are disabled. If that were the case, prior incidents of intolerance might be probative of general hostility even if such incidents did not rise to the level of a statutory violation. However, the proffered testimony in this case indicates that, at most, Boise did not like its employees to miss work for medical appointments or family illness. Even assuming that the proffered testimony demonstrated that Boise had a discriminatory animus toward "employees with medical problems," as opposed to a dislike for employees missing work, there do not appear to be any reported cases extending the rule articulated in *Heyne* to such an amorphous group. All the reported cases in which evidence of other incidents was allowed involved evidence related to a group defined by clearly established parameters such as gender, *see, e.g., Hurley v. Atlantic City Policy Department*, 174 F.3d 95, 110-11 (3d Cir. 1999), or race, *see, e.g., Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988). It cannot be said that Judge Jelderks abused his discretion in declining to extend these holdings to allow testimony regarding hostility toward a group which is not clearly defined and not clearly protected under the law, particularly when he had concluded that admission of the testimony would be

prejudicial.

III. Admission Of The BOLI Documents

Beachy sought to exclude from evidence the BOLI's Notice of Dismissal informing her that the BOLI would not proceed with her case because it "did not find sufficient evidence to continue [its] investigation." Beachy also sought to exclude the BOLI's Dismissal Memo detailing the BOLI's investigation of her claim. Beachy argued that admission of these documents would confuse the issues and would create a danger that the jury would substitute the agency's judgment for its own judgment. Beachy argued that under these circumstances the documents should be excluded pursuant to Federal Rule of Evidence 403, because the probative value of the documents was outweighed by the potentially prejudicial effect. Judge Jelderks admitted the documents over Beachy's objection.

Beachy argues that admission of the documents was erroneous on two grounds. First, she argues that admission of the documents was prejudicial because the documents could have confused the jury and led it [sic] substitute the BOLI's judgment for its own. In addition, she argues that admission of the Dismissal Memo was erroneous because it contained summaries of witness statements which constituted hearsay.[6]

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[6]Beachy's statement of issues on appeal asserts an additional error based upon Judge Jelderks' failure to give a limiting instruction regarding the BOLI documents. However, neither her opening brief nor her reply brief address substantive argument to this asserted error. Moreover, for the reasons discussed below, we conclude that the admission of the BOLI documents did not affect Beachy's substantial rights, even in the absence of a limiting instruction.

With respect to Beachy's first argument, we conclude that it is unclear from the record whether Judge Jelderks considered the prejudicial effect the BOLI documents might have on the jury. Boise argued that the BOLI documents were admissible under *Plummer v. Western International Hotels Co., Inc.*, 656 F.2d 502 (9th Cir. 1981) and *Heyne*, 69 F.3d 1475, in which we held that it is reversible error for a district court to exclude an agency's determination of probable cause. Judge Jelderks subsequently found the BOLI documents to be admissible, characterizing the documents as a "probable cause finding." Accordingly, it appears that Judge Jelderks may have felt compelled to admit the documents pursuant to *Plummer* and *Heyne* and may not have weighed independently the documents' probative value and potential for prejudice.

We now hold that an agency's determination that insufficient facts exist to continue an investigation is not *per se* admissible in the same manner as an agency's determination of probable cause. Whereas the latter type of determination indicates only that there is probable cause to believe a violation has occurred, the former type of determination in effect constitutes a finding of no probable cause and terminates the agency's inquiry. In this sense, a determination of insufficient facts is a final ruling by the agency. There is a much greater risk of unfair prejudice involved in introducing a final agency ruling as opposed to a probable cause determination, because a jury might find it difficult to evaluate independently evidence of discrimination after being informed of the investigating agency's final results. *See Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 14;88, 1500 (9th Cir. 1986). Accordingly, we have held that a district court asked to admit an agency's letter of violation must weigh the letter's prejudicial effect against its probative value pursuant to Rule 403. *See id.* We conclude that the same rule

should apply when a district court is asked to admit an agency's determination that insufficient facts exist to continue an investigation.[7]

The fact that Judge Jelderks may have admitted the BOLI documents without performing the weighing process mandated by Rule 403 does not necessarily require reversal. "An evidentiary error does not require reversal of a jury verdict unless a party's substantial rights were affected." *Gilchrist*, 803 F.2d at 1500. In a civil case, the question of whether a party's substantial right to a jury trial has been affected turns on whether "the jury's verdict is more probably than not untainted by the error." *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983). If the jury more probably than not would have reached the same result absent the error, the error is harmless and the party's substantial rights have not been affected. *See id.*

After reviewing the record, we conclude that the jury more probably than not would have found for Boise even if the BOLI documents had been excluded. Beachy's discrimination case was not particularly strong, and Boise presented substantial evidence that it had legitimate, non-discriminatory reasons for terminating her. Moreover, Judge Jelderks instructed the members of the jury that "[y]ou must each decide the case for yourself" based upon *all* of the evidence presented during the trial. We therefore conclude that any error in the admission of the BOLI documents was harmless and did not affect Beachy's substantial rights.

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[7]We note that the only other Circuit to address this precise issue has reached the same conclusion. *See Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 65 and n.3 (2d Cir. 1998).

With respect to Beachy's assignment or error based upon hearsay, she failed to raise a hearsay objection to the BOLI documents at trial. Thus we apply the plain error standard, under which we consider whether the asserted error was highly prejudicial and affected Beachy's substantial rights. *See Sablan v. Department of Fin. of C.N.M.I.*, 856 F.2d 1317, 1323 (9th Cir. 1988); *see also Scott v. Ross*, 140 F.3d 1275, 1285 (9th Cir. 1988), *cert. denied*, 119 S.Ct. 1285 (1999). As is set forth above, we have concluded that any error in the admission of the BOLI documents was harmless and did not affect Beachy's substantial rights.

Accordingly, the judgment of the district court is

AFFIRMED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Susan Beachy, *Plaintiff-Appellant,*	No. 98-35321
v.	D.C. No. CV96-00656-JJ
Boise Cascade Corporation, *Defendant-Appellee.*	ORDER

Before: CANBY and T.G. NELSON, Circuit Judges, and FOGEL, District Judge[1]

The panel has voted to deny Appellant's petition for rehearing. Judges Canby and T.G. Nelson voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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[1] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by desgination.